Rules and the Containment of Interpersonal Conflict in Congress

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Abstract

Congressional rules are chosen by majority vote, but the application of those rules often leads to different outcomes than would prevail under direct majority rule. Why does Congress enact rules in the first place, and why wouldn’t a majority overturn those rules whenever it disliked the outcomes they produced? Drawing from work in psychology, I argue legislators become angry and engage in socially costly retaliation when unfavorable outcomes are produced by discretionary authority but not when they are produced by the application of fixed rules. Consequently, rules sometimes inefficiently allocate congressional resources, but they also reduce costly interpersonal conflict within the institution. I present a model that provides conditions under which the legislature prefers rules and draw support for its predictions from the organization of Congress and extant empirical literature.

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1 Introduction

Congress is a self-governing institution: aside from a few restrictions imposed by the Constitution, each chamber may set its own rules by majority vote (Krehbiel, 1991). The majority may change the rules even when previously agreed upon rules formally preclude them from doing so. Thomas Reed’s elimination of the disappearing quorum (McCall, 1914), George Norris’s evisceration of the Speaker’s right to assign committees (Peters, 1997), and Harry Reid’s invocation of the nuclear option to confirm judicial nominees and executive appointments (Smith, 2014, 1) are all examples of rules that were passed by majority vote in violation of the standing rules of their respective chambers. These examples of majorities summarily ignoring the constraints imposed by previous rules validate the central premise of remote majoritarianism: rules persist only so long as they work to the advantage of the majority of the legislature. If a majority ever determined it would do better by violating a rule or replacing it with some other alternative, it is free to do so.

However, these rules sometimes produce outcomes noxious to a majority of the chamber. To provide one vivid example, in 1942, Carter Glass of Virginia, Chairman of the Senate Appropriations Committee, made his last appearance on Capitol Hill. He would spend the remaining four years of his life too ill to attend to any government business whatsoever, but he would also retain his position as chairman throughout those years. In his stead, the septuagenarian Kenneth McKellar presided over the committee. Unfortunately, McKellar was so old and senile that, “after he had been presiding over a committee hearing for some hours, he would pound the gavel to signal the session to begin” (Caro, 2002, 82-83). Both of these men owed their positions to the rigid seniority rule which automatically awarded leadership of Senate committees to the member of the majority party with the longest continuous service on the committee. A similar system prevailed in the House of Representatives, and in both chambers it periodically enthroned chairmen who were plainly too senile,
or infirm, or incompetent to effectively discharge their duties (Goodwin, 1959). It is difficult to imagine that majorities either on the floor or within each party could possibly have constituted to elect chairs incapable of fulfilling the role’s most basic duties. Evidently, legislators feel obliged to abide by these rules (and usually do) even in cases where they would prefer some other outcome. As the chairmanship of the Senate Appropriations Committee demonstrates, and as innumerable other examples could reinforce, deference to the rules has profound impacts on the operation and output of Congress.

Yet the House, the Senate, and the parties within them are all self-governing institutions that have the right to determine their own rules. Why would they create rules like the seniority system (informally in the House, formally in the Senate) that surrender the chamber’s discretion over its own organization, and why would they abide by the dictates of those rules in the cases where they produced outcomes objectionable to the majority of the chamber?

This question lies at the heart of the conflict between two powerful but competing paradigms. Much of the political science literature on legislative organization adopts the perspective of “remote majoritarianism.” These studies argue that the rules, on a case-by-case basis, produce outcomes that the majority prefers to all available alternatives. This paradigm has produced analytically rigorous albeit sometimes controversial explanations for closed rules during floor debates (Gilligan and Krehbiel, 1987; Krehbiel, 1991; Callander, 2008), concentration of agenda setting rights in the majority party (Cox and McCubbins, 2005; Diermeier and Vlaicu, 2011; Diermeier et al., 2015), the right to impose delay during cloture votes (Fong and Krehbiel, 2018), and the selection of committee chairmen by seniority (McKelvey and Riezman, 1992; Eguia and Shepsle, 2015). However, remote majoritarianism has produced only casual speculations as to why a majority would apply a rule even when

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1These explanations of the seniority rule rely on a Baron and Ferejohn (1989) divide-the-dollar game, and model committee leadership as a heightened probability of recognized as the proposer. This assumes away the relevance of valence differences between candidates for chairmanships. It does not engage with the empirical puzzle of how senile legislators could be installed as committee leaders.
it would prefer some other outcome in a particular instance.

Research in historical institutionalism, on the other hand, readily recognizes that rules periodically frustrate the intentions of the majority. However, studies in this tradition deny the majority’s capacity to bend the rules to its will. Rather, they argue that the development of legislative rules is a path dependent process, and future changes to the rules must be agreed to within the context of existing rules. This perspective has seen its clearest expression in research on the filibuster (Binder, 1997; Binder and Smith, 1997), which argues that the filibuster has seldom enjoyed majority support in the Senate, but rather protects itself by imposing a supermajority requirement for rule changes. Recent developments in the Senate, coupled with earlier conflicts over procedure in the House, call this supposition into question.

A theory that could explain the conditions under which self-governing institutions defer to their own rules would reconcile these competing paradigms. It would also clarify the stakes of the recent rise of rule-breaking and the decline of regular order. Many inside and outside of the academy have lamented the increasing tendency of Congress to resort to procedural hardball (Mann and Ornstein, 2016), but the precise consequences of making decisions by direct application of majority rule rather than by the existing rules are not well understood.

I offer a theory that proceeds from a novel assumption: legislators respond differently to undesired outcomes depending on whether they are produced by human discretion or by fixed rules. When an adverse decision results from the exercise of discretionary authority by identifiable legislators, the recipient of the adverse decision may become angry and retaliate against those who made the decision. If that same decision follows from the application of a rule fixed far in advance, the recipient does not retaliate (although, of course, if the rule repeatedly produces adverse decisions, they may seek to change the rule).

Thus, even though reliance on rules sometimes leads to socially inefficient resource allocations, such as the appointment of a senile committee chairmen,
it also reduces costly interpersonal conflict between legislators, such as failed candidates for committee chairs trying to undermine and humiliate those who prevented their appointment. I articulate this theory through a model. It identifies four conditions under which a majority of the legislature prefers a fixed rule to its own discretion. Reliance on rules is more attractive when the propensity of legislators to retaliate is high, when the rule typically produces the same outcome that would be produced by a majority vote, when most legislators are roughly indifferent between the possible outcomes, and when most resources are already distributed according to rules rather than discretion. These predictions are consistent with features of congressional organization and receive anecdotal empirical support from the extant empirical literature. Most importantly, the model suggests that the institutionalization of Congress in the early 20th century played a central role in the harmonious character of the textbook Congress of post-war era, that legislative rules may be path-dependent even if they can be altered at any time by a simple majority, and that the decline of regular order in favor of direct application of majority rule imposes a deadweight loss on the institution.

2 Perspectives on Rules

For present purposes, a rule is an algorithm for adjudicating legislative conflicts or allocating the chamber’s resources. For example, the seniority rule for chair selection awards the chairmanship of each committee to the member of the majority party with the longest continuous service on the committee. The Johnson Rule prohibits a senator from receiving an assignment to a second major committee until every senator in the party has an assignment to at least one major committee. The germaneness rule requires that an amendment must address the same subject as the matter being amended. Each of these rules dictates how some problem faced by the legislature - how to allocate committee assignments or chairmanships, or whether to consider an
amendment - is to be solved. A rule may call for a specific decision, as in the case of the seniority rule and the germaneness rule, or may merely constrain the set of permissible decisions, as in the case of the Johnson Rule. If a legislative majority follows the dictates of a rule even though, in the absence of the rule, it would choose some other outcome, the legislature “defers” to the rule.

The question of why a self-governing institution would defer to its own rules has deep roots in political science. Responding to developments in social choice theory, which demonstrate that under fairly general conditions, for any given proposal, there is a majority that prefers some other proposal (McKelvey, 1976; Schofield, 1978), Shepsle and Weingast (1981) show that rules create a “structure-induced equilibrium” that resolves the problems of instability and preference cycling. Riker (1980) objects that if rules determine the winner and the rules themselves are chosen by majority rule, then the choice of institution inherits the problems of preference cycling and instability. Once the rules produced a likely winner, a majority that preferred some other outcome would coalesce to change the rules, plunging the legislature into chaos.

A variety of responses have been ventured for why a majority would not vote to change the rules. Perhaps legislators are risk averse and find it difficult to anticipate the long-term consequences of changing the rules. Perhaps it is difficult to organize a coalition to change, and those who typically benefit from the rules will punish failed attempts (Shepsle, 1986). Perhaps there is an upfront cost associated with designing new rules, or the adoption of new rules destroys the human capital associated with experience operating under the old rules (Martin and Thomas, 2013).

However, all of these responses are frictions associated with replacing an existing rule with some other rule. They do not deter a legislature from violating a rule in a particular instance and then applying the rule in future cases. Recent studies have recognized the attractiveness of rule-breaking and
recognized that there must be some costs associated with rule-breaking (Shepsle, 2017; Binder, 2018), but they have been vague about what precisely those costs are. They posit that it is difficult to violate rules in some cases while preserving their application in others, but do not specify a mechanism by which the violation of a rule in one instance limits its force in another.

Weingast and Marshall (1988) provide the most complete account for why a legislature would defer to its own rules. Majority rule does not by itself account for differing intensities of preferences, which can lead to Pareto inefficient outcomes. Legislators may be able to do better if they exchange influence over decisions about which they care little for outsized influence over the decisions about which they care most. However, the volatility of the political environment and the possibility that legislators will lose their seats at the end of each session make it difficult to sustain a market for exchanges of influence. Instead, legislators must create rules that systematically assign outsized influence to those who care most about a given decision. While these institutions by construction lead to anti-majoritarian outcomes on a bill-to-bill basis, they nonetheless make each legislator better off overall. Weingast and Marshall concentrate on the persistence of rules guaranteeing committee gatekeeping rights, but the gains from trade has informed explanations for other features of the institution, such as party leadership (Bawn, 1998) and the filibuster (Wawro and Schickler, 2006; Bawn and Koger, 2008). It provides a potentially general explanation for when a majority will prefer fixed rules to majority decisionmaking: when the intensity of preferences are heterogeneous and when the volatility of the political environment makes rules necessary to secure gains from trade.

Gilligan and Krehbiel (1994) raise a serious theoretical objection to this gains from trade perspective. Even if institutions to secure gains from trade would be socially efficient, game theory shows that that does not imply they can be sustained in equilibrium. If a rule defies the majority’s will in any given case, how does that majority resist the temptation to defy the rule and
institute its preferred outcome? An equilibrium under which the violation of a rule leads to the dissolution of the rule altogether could be sustained under infinitely repeated play, but, by a folk theorem argument, so too could an equilibrium that permitted violations of the rule and so too could complete defiance of the rule.

Setting aside this theoretical challenge to existing perspectives, the core predictions of the gains from trade model are at odds with congressional history. The nature and history of the seniority rule highlights these predictive shortfalls. Gains from trade predicts that rules only arise in response to (or anticipation of) market failures - i.e. when the agenda is too volatile and the future tenure of legislators is too uncertain to allow for market exchange. Yet the seniority rule took hold of the House of Representatives at the dawn of an unprecedented period of political stability in the United States. The New Deal, Cold War, and Civil Rights Movement set the policy agenda for decades to come, and the tenure of legislators grew to historic highs (Polsby, 1968). As Polsby highlights, the apex of institutionalization of Congress in the middle of the 20th century was characterized both by exceptional stability and the proliferation of formal and informal rules. If ever there were a period in which market-based exchange could have succeeded in Congress, this was it. And as followup work on the deinstitutionalization of Congress demonstrates, the modern shift towards pure majority rule has been accompanied by shortening tenures and increased political volatility (Lee, 2016; Chergosky and Roberts, 2018).

3 Theory

The difficulty of reconciling remote majoritarianism with anti-majoritarian outcomes underscores the need for a new theory that specifies the conditions under which Congress relies on fixed rules versus the discretion of the majority or its agent. I offer a theory which casts conflicts in Congress as disputes
over the allocation of scarce resources - resources like committee chairmanships, access to the agenda, plenary floor time, funds from congressional hill committees, committee assignments, office space, time to question witnesses during hearings, staff members, and so on. These resources provide private benefits to those who receive them, but also have positive or negative externalities on the rest of the legislature. For example, a committee chairman uses his office for his own aggrandizement, but his performance also produces value (or harm) for every other legislator. Whenever there are two or more claimants to a non-divisible resource, one of them will get the resource and the rest will leave disappointed. The theory rests on two assumptions about how legislators behave when they do not get the resources they sought. Both draw on extensive research from throughout the social sciences.\(^2\)

First, legislators, like most human beings, are intrinsically motivated to punish those who have harmed them. For present purposes, when a candidate loses a bid to become committee chairman, when a supplicant is denied access to the agenda or plenary floor time, when an embattled candidate does not get the campaign funds he or she requested, and when that denial is traceable to the deliberate choice of some other actor, the injured legislator retaliates against that actor. If that actor is the majority (or the majority’s agent, the party leader), the loser may become less inclined to vote for the party’s procedural motions and priority legislation, to cosponsor others’ legislation, to participate in committee hearings, to raise funds for party members, and so on. This retaliation can have far-reaching consequences, because legislators look to their peers when deciding how to vote (Fong, 2019a; Zelizer, 2019). The retaliation of even one legislator may thereby ripple through the legislative network, influencing all of those connected to that rampaging legislator.

This proclivity to engage in potentially costly retaliation in response to

\(^2\)Much of that literature studies ordinary human beings rather than political elites, and so it is possible that future empirical research may deem them untenable in a legislative context. Even so, they are plausible on their face and allow for the construction of a theory that yields provocative yet plausible predictions. If nothing else, this study illustrates that it would be worthwhile to investigate the extent to which legislators are psychologically typical human beings.
past wrongs is well-documented in social psychology, evolutionary psychology, and behavioral economics (Trivers, 1971; Fehr and Gächter, 2000, 2002; De Quervain et al., 2004; Sobel, 2005; Yamagishi et al., 2009). Early results in game theory identified that credibly committing to costly retaliation gives an actor an advantage in strategic interactions, and evolutionary game theorists and psychologists have argued that human beings evolved cognitive faculties that facilitate credible commitment (Frank, 1988; Reed and DeScioli, 2017).

For example, transgression triggers anger, and once the target of the transgression is angry, he or she is motivated to inflict damage on the transgressor, even at cost to him or herself (Nesse, 1990; Reed et al., 2014).

Second, legislators, like most human beings, only retaliate against transgressors who could have freely chosen to do otherwise. When a legislator loses a competition for a resource, he or she does not retaliate against anyone if that loss was caused by the application of a rule that was fixed far in advance of the decision. For instance, if a candidate for a committee chairmanship loses because the Speaker of the House selected some other candidate that he or she preferred, then the candidate retaliates against the Speaker. If, on the other hand, that candidate loses out on the chairmanship because the other candidate had greater seniority, and either the formal rules of the party or a deeply entrenched injunctive norm mandate the selection of the most senior candidate as chair, then the losing candidate does not retaliate against anyone.³

While this assumption is more contentious than the first and the evidence in favor of it is less direct, it is nevertheless intuitively and academically plausible. Research in behavioral and neuroeconomics establishes that humans playing games like the ultimatum game respond differently to behavior based on whether it is produced by a pre-programmed computer or a human player,

³The conclusions of both the verbal theory and the model do not require that legislators always retaliate in the absence of a rule and never retaliate in the presence of one. It is sufficient for them to retaliate more often or more intensely in the absence of a legitimate rule than in the presence of one.
even when there is no strategic incentive to do so. Regions of the brain associated with anger and disgust are more active when playing against human players than computer opponents (McCabe *et al.*, 2001; Sanfey *et al.*, 2003). The assumption requires the leap that people treat humans following rules at least a little bit like they treat computers. This is consistent with work in the psychology of responsibility, which emphasizes that people are rarely held responsible for following the legitimate orders of superiors (Simon, 1947; Hamilton, 1978; Karakostas and Zizzo, 2016). Research in procedural fairness gives reason to believe that obedience to rules will act in much the same way (Tyler, 2006; Van Kleef and Côté, 2007).

These two assumptions together imply an important function for rules: they mitigate costly interpersonal conflict. Congress cannot avoid making decisions about how to allocate scarce resources. One option is for the majority to exercise discretionary authority over who gets which resources, either through direct votes or through the discretion of its agents, such as the leader of the majority party. Discretionary authority allows the resources to be targeted towards those who will use the resources to produce the most value for others. However, it also provokes retaliation from those denied the resource. This can be avoided by agreeing to a rule for allocation in advance of the decision. The rule may inefficiently allocate the resource to someone who will not use it to produce much value for others, but it avoids retaliation by those who were disappointed.

This function suggests the conditions under which a majority prefers to enact a rule rather than make allocation decisions by majority vote. Most broadly, a majority prefers rules when the costs of interpersonal conflict engendered by discretion exceed the gains from precisely targeting who gets a given resource. More specifically, rules are preferred to discretionary authority when (1) the propensity of legislators to retaliate is high, (2) when the rule typically gives the resource to whomever would receive it under discretionary authority, (3) when the claimants to the resource would each produce roughly
the same amount of public goods with it, and (4) when whoever would not get the resource under majority rule controls a great many resources.

These intuitions yield a number of theoretically interesting implications. First, a rule that mimics the allocation that would be made via discretion is always preferred to the exercise of discretion. This suggests that legislatures will seek to enshrine behavioral regularities as rules. Second, leaders who have discretionary authority may decline to use it if there is some precedent or rule upon which they can rely. This contradicts one of the core presumptions of principal-agent theory - that agents are better off when they have discretion. Third, the use of rules will exhibit a tipping point behavior. When a leader already controls the allocation of most resources, controlling the allocation of an additional resource is more attractive, because the losers have little left with which to retaliate. When a leader controls few resources, relinquishing control of those resources becomes more attractive, because assigning them provokes retaliation from an angry, resource-rich legislator.

4 Model

These theoretically interesting conclusions call for an explicit formal model that specifies the conditions necessary for them to follow. The intuition can be conveyed with a simple static decision problem with only one player, a unitary legislature. The legislature must decide which of two claimants will get some scarce, indivisible legislative resource. For example, both claimants may seek the chair of the same committee. Alternatively, one claimant may want to make an amendment to the other’s bill, while the sponsor of the bill wants a closed rule. Or perhaps both claimants seek scarce floor time for the consideration of their respective bills. Whatever the conflict, the legislature may enact a rule in advance of the decision. Once enacted, the rule proposes which of the two claimants should get the resource, although the rule must be fixed far in advance such that the legislature cannot foresee which of the two
claimants the rule will favor before it enacts the rule. Whether the legislature enacts a rule or not, it must then decide which of the two claimants. Afterwards, the legislature must award the resource to one of the two claimants gets the resource. The legislature then receives a payoff based on who gets the resource but also incurs some cost from the retaliation of whichever claimant did not get the resource. The costliness of the retaliation depends on whether the legislature’s decision was made in accordance with an enacted rule, in violation of an enacted rule, or in the absence of any rule.

Appendix B endogenizes the choices of the claimants to the resource, and appendix C considers an extension to the baseline model in which the legislature consists of a heterogeneous set of legislators (including the two claimants) who make decision by majority rule. These extensions yield the same substantive conclusions as the simpler model with a single resource and a unitary party, but the simpler model has the expositional advantage of being easy to solve and easy to analyze. Focusing on the baseline model facilitates the exposition of the core intuition. Reliance on a static model shows that repeated play and multiple equilibria are not necessary to produce the key results, although the results could of course also be sustained under repeated play.

The two key assumptions from the verbal theory are both embedded as reduced-form modeling assumptions. Legislators’ intrinsic motivation to harm those who have harmed them is embedded as a mechanical cost that the legislature incurs as a result of allocating the resource to one candidate or the other. The ability of rules to modulate how angry legislators become in response to adverse decisions is embedded by allowing that cost to vary as a function of how the decision was produced. If either of these assumptions were removed from the model, then the legislature would never defer to its own rules and, if there were even an infinitesimal transaction cost associated with enacting a rule, would never enact rules in the first place.
4.1 Sequence

Figure 1 illustrates the game sequence. A unitary legislature must decide whether to give a resource to claimant $i$ or claimant $j$. It first decides whether to enact a rule that governs how the resource ought to be allocated ($r = 1$) or not ($r = 0$).

If the legislature enacted a rule, the rule then recommends which of the two candidates gets the resource. In the model, this is encoded by making the rule a stochastic recommendation system that recommends the resource be given to $i$ ($\hat{y} = i$) with probability $p$ and $j$ ($\hat{y} = j$) with probability $1 - p$, with $0 < p < 1$. The legislature knows $p$ in advance. The model does not suppose that the rule literally assigns the resource stochastically. Rather, at the time the legislature must enact the rule, it simply cannot foresee whether the rule will make the same decision that it would if it directly applied majority rule. If the legislature could foresee precisely which claimant to the resource would get it under the rule, then applying the rule would be substantively indistinguishable from assigning the rule by majority vote, and whichever claimant did not get the resource would have no reason to restrain their retaliation.

Finally, the legislature decides which of the two claimants gets the resource by choosing $y \in \{i, j\}$. This decision must be made whether or not the legislature enacted a rule. If the legislature enacted a rule, it may follow the dictates of the rule ($y = \hat{y}$) or it may violate the rule and give the resource to the other claimant ($y \neq \hat{y}$). Thus, this model does not allow the legislature to commit itself to following its own rules. Because the legislature is a fundamentally majoritarian institution, the majority always retains the final say over any allocative decision. However, whether the legislature enacted and followed a rule influences the payoffs the legislature receives.
r is a binary decision variable, where \( r = 1 \) corresponds to enacting a rule for distributing the resource and \( r = 0 \) corresponds to leaving the distribution of the resource to the discretion of the majority de jure. \( \hat{y} \) is a random variable that reflects how the rule applies to the particular allocation decision, where \( \hat{y} = i \) means that applying the rule gives the resource to \( i \) and \( \hat{y} = j \) means that applying the rule gives the resource to \( j \). \( y \) is the choice of who actually gets the resource.

The unitary legislature seeks to maximize its utility, where

\[
\begin{align*}
    u(r,y|\hat{y}) &= (x_i - A(r,y|\hat{y})R_j)1\{y = i\} + (x_j - A(r,y|\hat{y})R_i)1\{y = j\} \\
    A(r,y|\hat{y}) &= ra_d + (1-r)[a_r + (a_v - a_r)1\{y = \hat{y}\}] \\
\end{align*}
\]

\( x_i \) and \( x_j \) reflect the intrinsic stakes of the decision. If the resource is a committee chairmanship, then \( x_i - x_j > 0 \) if \( i \) will do a better job (from the perspective of the legislature as a whole) than \( j \) will do. If the resource is an amendment that \( i \) wants to propose even though bill sponsor \( j \) prefers a closed rule, then \( x_i - x_j > 0 \) if the legislature would, all else equal, prefer to vote on the amendment. However, all else is not equal. \( A \) reflects the costs imposed by the retaliation from whichever claimant did not get the resource. \( A \) takes a different value depending on the procedure that led to the loser not getting the resource. \( A = a_d \) if the legislature declined to enact a rule and assigned the resource by its discretion (the \( d \) is for discretion). \( A = a_r \) if the legislature enacts a rule and faithfully applies it (the \( r \) is for rule). \( A = a_v \) if the legislature enacts a rule but then refuses to apply it once it renders a decision (the \( v \) is
for “violation” of the rule). By assumption, $a_v > a_d > a_r$. The faithful application of a rule makes the losing candidate laess angry and retaliate less than he would if the same outcome were produced by the majority allocating the resource at its discretion. However, the claimant becomes even angrier and retaliates even more intensely if he was entitled to the resource under an agreed upon rule but the majority proceeded to violate the rule. $R_i$ and $R_j$ reflect the capacities of $i$ and $j$, respectively, to impose costly retaliation on the legislature. A claimant who controls an important institutional position or an attentive audience outside the legislature or an important bloc of votes has a larger $R$ than one who does not.

### 4.2 Solution

Characterizing the legislature’s optimal strategy requires characterizing three decisions. First, if the legislature does not enact a rule, does it give resource to $i$ or $j$? Second, if the legislature enacts a rule and it recommends $i/j$, does the legislature follow the rule or violate it? Finally, does the legislature enact a rule in the first decision node? Appendix A solves for the optimal solution via backwards induction, and Proposition 1 summarizes the result.

**Proposition 1.** Assume without loss of generality that $i$ gets the resource under discretion, $x_i - x_j \geq a_d(R_j - R_i)$ (otherwise, flip the labels).

- If $x_i - x_j \leq \frac{a_d - a_r}{1-p} R_j + a_r(R_j - R_i)$ and $x_i - x_j \leq a_v R_j - a_r R_i$, then the legislature enacts and defers to the rule, $r^* = 1$ and $y^* = \hat{y}$.
- If $x_i - x_j \geq a_v R_j - a_r R_i$ and $a_d \geq pa_r + (1-p)a_v$, then the legislature enacts the rule but violates it if it assigns the resource to $j$, $r^* = 1$ and $y^* = i$.
- Otherwise, the legislature retains its discretion, $r^* = 0$ and $y^* = i$.

The intuition for this result comes from studying the three decisions the legislature must make. The legislature never violates the rule when it gives the
Figure 2: Optimal Strategy for Legislature

A rule is enacted and enforced when $p$ is sufficiently large and $x_i - x_j$ is sufficiently small. If $a_v R_j - a_r R_i$ determines the cutpoint for $x_i - x_j$ at which the rule can no longer be credibly enforced. As in the solution, it is assumed without loss of generality that $i$ gets the resource if discretion is used, $x_i - x_j \geq a_d (R_j - R_i)$.

resource to $i$, the candidate who would have received it if the legislature had not enacted a rule. If the rule proposes to give the resource to $j$, the legislature will violate the rule when the benefit from giving the rule to $i$ compensates for the cost of incurring $j$’s wrath. If the legislature anticipates it will defer to the rule, it simply compares the lottery of what it will get under the rule to what it would get under discretion. If the legislature anticipated it will violate the rule if the rule proposes to give the resource to $j$, it only enacts the rule if, in expectation, $j$ retaliates less in response to the rule than in response to discretion.  

Proposition 1 arranges the conditions to make it convenient to characterize comparative statics. Figure 2 presents these comparative statics graphically.

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4It might seem odd that a losing claimant would be pacified by a rule which the legislature will violate whenever it sees fit. Appendix D addresses this issue.
The figure focuses on the role of two key parameters: the probability that the rule gives the resource to the candidate who would get the resource under majority rule, $p$, and the difference in the benefit the legislature receives from giving the resource to $i$ rather than $j$ apart from any costs imposed by retaliation, $x_i - x_j$. The legislature prefers to enact a rule and defer to its dictates so long as $p$ is sufficiently large compared to $x_i - x_j$. The remaining parameters enter the optimal strategy by defining two thresholds. The first threshold defines the $x_i - x_j$ above which it the legislature has an incentive to violate the rule whenever it assigns the resource to $j$, $a_v R_j - a_r R_i$. As this threshold increases, deference to the rule is sustainable for a wider range of $x_i - x_j$, and for any given $x_i - x_j$, the $p$ necessary to make the rule more attractive than discretion is smaller. The second threshold defines the $p$ below which assigning the resource by discretion is more attractive than enacting a rule and violating it if it assigns the resource to $j$, $\frac{a_v - a_d}{a_v - a_r}$.

This figure clarifies four “comparative statics” for the model, in the sense that if the parameters change in the specified direction, if the optimal solution were enacting and deferring to a rule, then that is still the optimal solution, and if the optimal solution were some other strategy, for a large enough change in the parameter, enacting and deferring to the rule becomes the optimal strategy. As a convenient verbal shorthand, I will describe these parameter changes as making an enforced rule “more likely,” even though the optimal solution is deterministic. First, as the intensity of the retaliation in response to the exercise of discretion ($a_d$) and the violation of a rule ($a_v$) increase and as the capacity of the rule to diffuse retaliation increases ($a_d$ decreases), an enforced rule becomes more likely. Second, as the public stakes of giving the resource to $i$ rather than $j$ ($x_i - x_j$) decreases, an enforced rule becomes more likely. Third, as the rule becomes more likely to give the resource to the candidate who would receive it under discretion ($p$ increases), an enforced rule becomes more likely. Finally, as the endowment of the candidate who does not get the rule under discretion ($R_j$) increases and the endowment of the
candidate who gets the resource under discretion ($R_i$) decreases, an enforced rule becomes more likely.

5 Empirical Implications

On some level, the model’s most basic result is also its most remarkable. Even if a legislator could become a dictator and unilaterally direct the allocation of resources, there are conditions under which that legislator would not want that authority. This result coheres with conventional wisdom: with power comes responsibility. Yet it is at odds with the pursuit of power as a primary motivation of legislators, and also with the intuition of principal agent models which emphasize how agents can use discretion to their advantage.

A series of episodes from the history of congressional leadership support the idea that influence over the allocation of legislative resources is not always attractive.\(^5\) When the seniority system came under fire in the 1960s, Speaker John McCormack was one of its most ardent defenders, even though he stood to gain more influence over the selection of committee chairs. McCormack explicitly emphasized the importance of the seniority rule for maintaining peace in the party (Nelson, 2017). Speaker Carl Albert spoke out against giving him the power to appoint members of the House Rules Committee (Frisch and Kelly, 2006, 201-202). The informal Hastert Rule, which states that the Speaker shall not allow a floor vote on a bill unless the majority of the majority party supports the bill, was promulgated by the very person whose discretion it was meant to restrict: Speaker Dennis Hastert (Green, 2010).

The model does not imply that legislators are never interested in enhancing their own influence, just that influence comes at a cost, and, under certain conditions, the its benefits are not worth the trouble it brings along with it.

\(^5\)Research in economics has produced results that agents want to restrict their own discretion, but there the restriction usually serves to facilitate credible commitment or collective enforcement (Bowen et al., 2013). Here, credible commitment is assumed to be impossible because the institution is self-governing, and rules are enforced only by the aggrieved claimant.
Importantly, the model yields comparative statics that specify those conditions. Since the model is highly stylized, its parameters require some supplementary interpretation before they can be rendered useful for predicting real world variation. Fortunately, this level of abstraction pays dividends, because it allows for the extraction of a rich set of predictions.

The first set of results concern the intensity of legislators’ motivation to retaliate as a function of how the allocation decision was made: $a_v$, $a_d$, and $a_r$. These parameters tap concepts from psychology. For example, the endowment effect is a well-documented cognitive bias that people assign more value to any given thing when they already own it (Kahneman et al., 1991). This suggests that it is attractive to allocate resources already owned by a legislator on the basis of a fixed rule - especially a rule that assigns it with a high probability to whomever already possesses the resource. The “property right” to committee assignments is just such a rule: legislators are entitled to maintain their committee assignments from the previous session except when they fail to support the party’s presidential nominee and when the party loses so many seats that there is no longer room for them on the committee (Grimmer and Powell, 2013; Powell and Grimmer, 2016). When members must be involuntarily removed, they are removed in reverse order of seniority. As Grimmer and Powell (2013) finds, strict reliance on seniority in this instance has persisted even as the seniority system weakens elsewhere. The model offers an explanation as to why: legislators would attempt to eviscerate anyone who chose to take their committee seats away.

Likewise, psychologists have found that violation of one rule or norm tends to weaken the force of other norms (Keizer et al., 2008). Thus, violating one rule may diminish the capacity of other rules to mitigate interpersonal conflict (violating a rule may cause $a_r$ to increase). This prediction offers an explanation for the rapid decline of regular order and its replacement by “procedural hardball” in both the House and Senate over the past thirty years. The violation of norms of informal rules of civility in the 1980s and early 1990s
weakened the normative force of other rules, which makes it more tempting ex post to violate rules that are already in place (by decreasing $a_v R_j - a_r R_i$).

This created a positive feedback loop, where each new violation of formal and informal rules incentivized further violations.

These predictions about the $a$ parameters also offers a way to clarify the distinction between formal and informal rules and an explanation for why Congress would rely on a particular mixture of formal versus informal rules, an issue that has generated enduring interest within political science (Binder, 2018). Perhaps writing a rule down weakens the motivation to retaliate after an unfavorable decision that conforms to the rule (decreases $a_r$) but also increases the motivation to retaliate after an unfavorable decision that violates the rule (increases $a_v$). This may allow for the enforcement of a rule in equilibrium that otherwise could not be enforced, but would also make violations of the rule very costly. Hence, institutionalization through formalization of a rule is attractive when the legislature rarely wants to violate a rule (either because $x_i - x_j$ is small or $p$ is large), but unattractive insofar as it diminishes the legislature’s flexibility when the rule produces a detestable outcome.

The second result states that a rule that mimics the allocation that would occur under majority rule is preferable to no rule at all (more generally, a rule is more likely as $p$ grows).\footnote{However, the best “rule” from the perspective of the legislature may be either $p = 1$ or $p = 0$. The legislature may not want the rule to mimic what it would do if it had discretion, because under discretion it may be bowing to the threat of costly retaliation from a richly endowed legislator. Formally, $x_i - a_r R_j > x_i - a_d R_j$ (a rule with $p = 1$ is certainly preferable to discretion), but that does not imply that $x_i - a_r R_j \geq x_j - a_r R_i$ (that the rule assigning the resource to $i$ is preferable to the rule assigning the resource to $j$). If $R_j < R_i$, then there exists some $x_i - x_j$ such that the legislature prefers to give the resource to $i$ under discretion but prefers that $j$ get the resource under the rule.} As a result, when the legislature finds that its discretionary decisions often follow some mechanical criterion, such as Germanenness or seniority, it has an incentive to enshrine that criterion as a formal or informal rule. This explains the difficulty of distinguishing descriptive from injunctive norms in Congress, and why many practices in Congress that start off as informal behavioral regularities eventually become enshrined as formal
rules. The seniority rule, the Hastert Rule, and various norms regarding the selection of conferees all developed in this way.

The third result states that an enforced rule becomes more likely as the legislature grows more indifferent as to who gets the resource (as $x_i - x_j$ decreases). $x_i$ and $x_j$ can be thought of as the “public” dimension of the allocation decision. The allocation of certain resources, such as leadership positions, have broad implications for the entire legislature. The allocation of other resources, such as office space, matter only to the claimants themselves. Many resources, such as committee assignments and access to the agenda, fall in between. Consistent with the theory, Rogowski and Sinclair (2012) report that House offices are determined by a lottery - an example of an unambiguously fair rule. Conversely, the selection of top party leaders has never been governed by a rule. Indeed, this result may explain why the Democratic behavioral regularity of a “leadership ladder,” where upon the departure of the Speaker, the Majority Leader became the Speaker and the Whip became the Majority Leader, never achieved the status of an informal rule.

The final result states when the losing claimant’s endowment increases ($R_j$ increases), an enforced rule becomes more likely. $R_j$ consists of all resources with which the losing claimant can retaliate. It includes the legislator’s vote, their ability to cosponsor, any influence they have over other legislators (Fong, 2019a), any institutional position they occupy and its associated gatekeeping rights, their capacity to help or harm the party or chamber’s reputation with the public through mass media communications, any campaign funds they may have raised and would otherwise be willing to transfer to other candidates (Powell, 2018), and more. This result has two substantive implications.

First, rules are more attractive in making decisions between members of the majority party, while discretion is more attractive for making decisions between members of the majority and minority parties. Members of the minority have relatively few resources with which to retaliate, especially in the House. Many of its legislators already withhold their votes from the major-
ity’s legislation, none occupies an institutional position with any meaningful gatekeeping rights, and they certainly do not have any campaign funds that would otherwise have gone to members of the majority party. The majority party has comparatively (and, in recent years, absolutely) little to lose by alienating members of the minority party. The reverse is true when a decision must be made between party members. To a first approximation, this prediction is consistent with the rules over the course of Congressional history. The Speaker of the House’s oldest and most stable right is the right to rule on questions of parliamentary procedure - a right which has historically had the greatest impact in resolving conflicts between parties. By contrast, the allocation of intra-party resources such as committee assignments, spots on conference committees, and the allocation of plenary floor time has at least at times been constrained by various formal and informal rules (Fong, 2019b).

Second, because $R_j$ is an endogenous function of other resource allocation decisions made by the legislature, reliance on rules versus discretion exhibits bifurcation, or, to use a popular term, “tipping point” behavior. The value of the resource(s) to be distributed by the legislature is normalized to 1, so $R_j$ can be interpreted as the value of $j$’s endowment relative to the value of the goods to be allocated by the legislature. When most resources have already been assigned by rules, $R_j$ is large, and hence using a rule to assign the resources that remain is relatively attractive. When most resources are to be allocated by the legislature’s discretion, $R_j$ is small, and hence using discretion to assign the resources that remain is very attractive. Causally, the more rules the legislature has, the more the it wants, and the more discretion it has, the more it wants. Consequently, the model predicts that transitions from using resources to rules tend to come in clusters, where many rules are enacted or repealed simultaneously. This is consistent with the history of the Speaker’s procedural rights outlined in Ripley (1967) and Fong (2019b). Changes to the Speaker’s discretion have come in discrete packages, with the legislature modifying the Speaker’s control over many different resources.
around the same time.

6 Conclusion

Rational choice institutionalism proceeds from the theoretically compelling position that congressional rules only persist so long as majority of legislators prefer them to alternative arrangements. The theory presented here reconciles the axiom of remote majoritarianism to the empirical regularity that legislators defer to their chosen rules even when they produce outcomes noxious to a majority. Adherence to rules prevents losers from becoming angry and engaging in socially destructive behavior. This deference arises because overturning the rule would expose them to venmous retaliation. A model that formalizes this theory yields predictions consistent with a wide variety of phenomena in the House of Representatives.

Many in the academy, the media, and Congress itself have decried the violation of precedent and the subversion of various norms in recent years (Mann and Ornstein, 2016). These accounts lack an explanation of precisely why a transition from a rule-bound institution to a more directly majoritarian institution ought to be lamented. The present theory, coupled with the well-established finding from psychology that the violation of one injunctive norm weakens the normative force of others (Keizer et al., 2008), provides an answer. As norm after norm is violated and rule after rule overturned, the ability of those that remain to suppress animosity and prevent interpersonal conflict erodes as well. Moving from a rule-bound institution to a directly majoritarian one will destroy a valuable tool for promoting peace between legislators and undermine future prospects for cooperation. Indeed, the model’s predictions imply that the elaborate systems of rules and norms that characterized the mid-20th century Congress (Matthews, 1960) played an essential role in the relative harmony of that period of the institution’s history.

The erosion of rules and norms is particularly troubling when paired with
a conjecture. The model presumed that the legislature can enact rules that possess normative force at will. I conjecture that in practice, rules gradually acquire normative force over time. The longer a rule has been in place and the more strictly the legislature has observed it, the more effective it becomes at diffusing anger and preventing retaliation.

This conjecture suggests a rational basis for path dependence. Because rules gradually develop effectiveness over time, the existing rules are “sticky.” Even if the context changes so that some other rule would allocate a resource more efficiently, the legislature may prefer to keep the current rules in place, because it will take too long for the new rule to become equally effective at suppressing interpersonal conflict. Consequently, the particular rules in place at any given time may better reflect the strategic imperatives of the time in which they were adopted than the present day. If the conjecture that rules grow in effectiveness over time is well-founded, the core claim of path dependence in historical institutionalism emerges even in a fully rational model of institutional choice.

However, the conjecture also amplifies the consequences of recent violations of rules and norms. The current stock of conflict-defusing rules was built up over centuries of congressional history. Once those rules are eviscerated, they cannot be easily replaced. Given the strong temptation to violate rules that have not yet developed much effectiveness in preventing retaliation and the potentially short time horizons of legislatures, it will be difficult for Congress to restore peace.

References


## A Solution to Baseline Model

The game can be solved via backwards induction.

First, consider the final decision of which of the two candidates gets the resource. If there is no rule in place ($r = 0$), then the legislature should give the resource to $i$ ($y^*(r = 0, \hat{y}) = i$) iff

\[ x_i - a_d R_j \geq x_j - a_d R_i \]

To simplify the remaining analysis, assume without loss of generality that the preceding inequality is satisfied. If the inequality is not satisfied, simply
relabel $i$ to $j$ and $j$ to $i$, and then it will be satisfied.

If there is a rule in place ($r = 1$), then the legislature should give the resource to $i$ ($y^*(r = 1, \hat{y}) = 1$) iff

$$x_i - [a_v 1(\hat{y} = j) + a_r 1(\hat{y} = i)] R_j \geq x_j - [a_v 1(\hat{y} = i) + a_r 1(\hat{y} = j)] R_i$$

If $\hat{y} = i$, then

$$x_i - a_r R_j \geq x_j - a_v R_i$$

because by assumption $x_i - a_d R_j \geq x_j - a_d R_i$, $a_r < a_d$, and $a_v > a_d$.

If $\hat{y} = j$, then the legislature should give the resource to $i$ only if

$$x_i - a_v R_j \geq x_j - a_r R_i$$

Thus,

$$y^*(r, \hat{y}) = \begin{cases} j & \text{if } r = 1 \text{ and } \hat{y} = j \text{ and } x_j - a_r R_i \geq x_i - a_v R_j \\ i & \text{otherwise} \end{cases}$$

Now consider the choice of $r$. If $r = 0$, then the legislature gets $x_i - a_d R_j$.

If $r = 1$, the legislature’s payoff depends on whether it will enforce the rule if $\hat{y} = j$. If $x_j - a_r R_i \geq x_i - a_v R_j$, the payoff associated with $r = 1$ is $p(x_i - a_r R_j) + (1 - p)(x_j - a_v R_i)$. Otherwise, the payoff associated with $r = 1$ is $x_i - [pa_r + (1 - p)a_v] R_j$. Thus,

$$r^* = \begin{cases} 1 & \text{if } x_j - a_r R_i \geq x_i - a_v R_j \text{ and } x_i - x_j \leq \frac{a_d - a_r}{1 - p} R_j + a_v (R_j - R_i) \\ 0 & \text{otherwise} \end{cases}$$

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B Endogenizing Retaliation

The baseline model assumed \( i \) and \( j \) mechanically converted the resource into goods for the legislature, and mechanically retaliate against the legislature when they do not get the good. However, it is straightforward to endogenize these activities by giving \( i \) and \( j \) utility functions of the form

\[
u_i(z_i, z_j, y, A_i) = \frac{1 - A_i 1(y = j)}{1 - x_i[1 - A_i 1(y = j)]}(z_i + z_j) + [1 - A_i 1(y = j)](R_i + 1(y = i)) \log(R_i + 1(y = i) - z_i)
\]

\[
A_i = \frac{\alpha_d(1 - r) + \alpha_r r(y = y) + \alpha_v r(y \neq y)}{x_i}
\]

where the legislature gets payoff \( z_i + z_j \).

With this utility function, \( z^*_i = x_i[1 - A_i 1(y = j)](R_i + 1(y = i)) \), so the payoff to the gain from giving the resource to \( i \) rather than \( j \) is \( x_i - x_j - AR_j + AR_i \) as in the baseline model. The interpretation is that \( i \) has a budget of \( R_i + 1(y_i = 1) \) to allocate between public goods, \( z_i \), and private goods. \( x_i, \alpha_r, \alpha_v, \) and \( \alpha_d \) influence the relative returns of public versus private goods. Legislators retaliate because they receive lower marginal utility from collective goods when they are angry, and hence reserve more of their budget (both any resource they might receive, \( y \), as well as their endowments, \( R_i \)) for private goods. For simplicity, legislators are assumed to be indifferent between the public goods they produce and public goods the other legislator produces.

One noteworthy feature of this utility function is that presents no coordination or collective action problem. Legislator \( i \)'s behavior is invariant to the choices of legislator \( j \), which greatly simplifies the analysis. Similar results would hold if public goods were subststitutable so long as \( i \) attaches higher marginal utility to the types of public goods he produces than the types of public goods \( j \) produces.
C Disaggregating the Legislature

The baseline model assumes the decision is made by a unitary legislature. If the legislature consists of three players, $i, j$, and a third legislator who has the same preferences as the unitary legislature, who determine whether to enact a rule and how to allocate a resource by majority rule, then the results are exactly the same as the baseline model, so long as retaliation does not take the form of legislators withholding extremely costly cooperation.

Suppose that $i$ attaches a private value of $v_i > 0$ to getting the resource, and the cost of imposing retaliation $A_i R_i$ is $k_i(A_i, R_i)$. Then if $i$ gets the resource, his payoff is $x_i - A_j R_j + v_i$, and if $j$ gets the resource, $i$’s payoff is $x_j - A_i R_i - k_i(A_i)$. For the results from the baseline model to follow, it is sufficient that $k_i(A_i, R_i)$ is not too negative. If retaliation is at all costly to the person engaging in the retaliation, then this condition is satisfied. Even if retaliation is somewhat profitable to the retaliator, as it would be if legislators retaliated by withholding costly cooperation that they would otherwise have offered, the results hold so long as retaliation is not too profitable compared to the value of the resource at stake.

To see why, suppose the third legislator wants to give the resource to $i$. This implies $x_i - A_j R_i \geq x_j - A_i R_i$, where the values of $A_i$ and $A_j$ depend on whether the legislature enacted a rule and, if so, whether its allocation decision follows the rule. If $v_i + k_i(A_i, R_i) \geq 0$, then this implies that $x_i - A_j R_j + v_i \geq x_j - A_i R_i - k_i(A_i, R_i)$, which is the condition necessary for $i$ to prefer getting the resource. Thus, $i$ and the third legislator vote to give the resource to $i$, and the resource goes to whomever the third legislator wanted it to go to.

Next, consider the decision of whether to enact a rule in the first place. Suppose the third legislator will want to violate the rule if it gives the resource to $j$. Then $x_i - [pa_r + (1 - p)a_v] R_j \geq x_i - a_d R_i$. Then $x_i - [pa_r + (1 - p)a_v] R_j + v_i \geq x_i - a_d R_j + v_i$, and $i$ also wants to enact the rule. Suppose the third legislator will want to defer to the rule. Then $p(x_i - a_r R_j) + (1 -
\( p(x_j - a_r R_i) \geq x_i - a_d R_i \). If \((1 - p)v_j + k_j(a_d, R_j) - pk_j(a_r, R_j) \geq 0\), then \( p(x_i - a_r R_j - k_j(a_r, R_j)) + (1 - p)(x_j - a_r R_i + v_j) \geq x_i - a_d R_i - k_j(a_d, R_j) \), and \( j \) also wants to enact the rule.

Thus, the third legislator is always in the decisive coalition, and under the weak assumption that legislators do not retaliate by withholding extremely costly cooperation (presumably because they do not engage in any extremely costly cooperation in the first place), the baseline model’s unitary legislator sacrifices little.

This result makes it easy to generalize to the case where the legislature consists of the two claimants, \( i \) and \( j \), and many other legislators with different parameters (i.e. for each legislator \( k \), there is a potentially different \( x_{i,k}, R_{i,k}, \) and so on). At least one of \( i \) and \( j \) will support the decision by the majority of the rest of legislature and the comparative statics remain the same as in the baseline model.

## D Hollow Rules

One limitation of the preceding analysis is that it allows for “hollow rules” - rules that are only respected if they give the resource to a particular candidate. A forward looking legislator would anticipate this result, and there is no reason why a legislator who does not get a resource should feel any better if it gives it to the other candidate knowing that he never had any chance of getting the resource himself. Modifying the model simply removes the option of using a rule when \( x_i - x_j \geq a_v R_j \). In that case, the chamber cannot credibly commit to abiding by a rule, so the only option is to use discretion.

Thus, the legislature enacts and follows a rule if \((1 - p)(x_i - x_j) \leq a_d R_j - a_r R_i \) and \( x_i - x_j \leq a_v R_j - a_r R_i \), and the legislature uses discretion otherwise. Note that this is precisely the same result as before.